Filed 7/30/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FIDENCIO CARILLO ALVARADO, Defendant and Appellant.	E049321 (Super.Ct.No. SWF012909) OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Johnson, Judge. (Retired judge of the San Diego Sup. Ct., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed with directions.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton, and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts 3, 4, and 5.

Defendant Fidencio Carillo Alvarado appeals from judgment entered following jury convictions for attempted lewd act on a child under 14 years old (Pen. Code, §§ 664, 288, subd. (a)[1]; count 1); attempted dissuading of a witness (§ 136.1, subd. (b)(1); count 2); and misdemeanor lewd and unlawful exposure (§ 314, subd. (1); count 4). The trial court declared a mistrial as to counts 3 and 5 because the jury was unable to reach a verdict. The trial court also dismissed count 6, willful failure to appear while on bail (§ 1320.5). The court suspended imposition of sentence and placed defendant on probation for five years, subject to various terms and conditions.

Defendant contends the order requiring him to register as a sex offender violates his equal protection rights under the state and federal Constitutions. He also argues that section 4019, as amended, applies retroactively and therefore his presentence conduct credits must be recalculated under section 4019, as amended. Defendant further asserts that the trial court erred in imposing various fees and costs as conditions of probation. We agree that these challenged probation conditions must be modified. In all other respects, we affirm the judgment.

1. Facts

At night, about two weeks before J.M.'s 14th birthday, defendant approached J.M. as she was walking with her friend, E.M., home. Defendant drove up to J.M. and asked her if she wanted to have sex with him. When J.M. looked in defendant's truck she saw defendant exposing his penis and stroking it. J.M. continued walking as defendant

[1] Unless otherwise noted, all statutory references are to the Penal Code.

followed her. After J.M. went home, she told her grandmother about the incident.

The day before J.M.'s 14th birthday defendant again approached J.M. in his truck as she was walking E.M. home. Defendant called J.M. over and asked her to meet him to have sex with him. J.M. saw defendant exposing and stroking his penis again. When J.M. told defendant she was going to tell her grandmother, defendant said he knew where J.M. lived and told her not to tell the police or her parents. J.M. went home and, while hiding behind a bush, wrote down defendant's license plate number as he drove down her street.

J.M. reported the incident to her grandmother and the police. The police located defendant in his truck and J.M. identified defendant. J.M.'s grandmother testified that about a week before defendant approached J.M., J.M.'s grandmother had shown defendant and another man one of her apartments that was for rent.

Defendant testified he had seen J.M. twice, including once when he and a friend went to J.M.'s apartment to look at an apartment J.M.'s grandmother was renting. After that, defendant saw J.M. two more times, including while he was driving down the street. Defendant claimed J.M. told him to stop and then ran up to his vehicle and asked where he was going. Defendant denied he exposed his penis. On another occasion, J.M. asked defendant to lower his window and she put her upper body in his truck. Defendant acknowledged that, after he was arrested, he told an officer he was attracted to J.M. and wanted to date her, but claimed he told the officer this because the officer was intimidating him.

2. Mandatory Sex Offender Registration

Defendant is required under section 290 to register as a sex offender because he was convicted of violating section 288, subdivision (a)[2] (attempted lewd acts on a child under 14 years old) and section 314, subdivision (1) (lewd exposure).

Defendant contends that he was denied equal protection of the laws under the federal and state Constitutions because sex offender registration is mandatory for his convictions, whereas it is discretionary for a section 261.5 conviction (unlawful intercourse with a minor). Defendant complains that persons convicted of committing or attempting to commit section 288(a) and section 314 offenses are similarly situated to those who commit a section 261.5 offense, yet they are treated differently.

The constitutional guaranty of equal protection of the laws under the federal and state Constitutions "'compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'" (*In re Gary W.* (1971) 5 Cal.3d 296, 303.) Where the statutory distinction at issue neither "touch[es] upon fundamental interests" nor is based on gender, there is no equal protection violation "if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*).) That is, where there are plausible reasons for the classification, our inquiry ends. To sustain defendant's equal protection challenge to sex offender

[2] Section 288, subdivision (a) is referred to herein as section 288(a).

registration under section 290, defendant must prove that the classification scheme is irrational.

Defendant's reliance on *Hofsheier, supra,* 37 Cal.4th 1185, *In re J.P.* (2009) 170 Cal.App.4th 1292, and *People v. Luansing* (2009) 176 Cal.App.4th 676 (*Luansing*) is misplaced since the defendants in those cases were convicted of violating section 288a, subdivision (b)(1) (oral copulation with a victim under the age of 18 years), rather than section 288(a) (lewd acts with a victim under 14 years old). In *Hofsheier*, the defendant, who was 22 years old, was convicted of engaging in oral copulation with a 16-year-old girl in violation of section 288a, subdivision (b)(1). Under section 290, the defendant was required to register as a sex offender. (*Hofsheier*, at p. 1192.) On appeal, the defendant argued that he was denied the constitutionally guaranteed equal protection of the laws because a person convicted of unlawful sexual intercourse with a minor (§ 261.5) under the same circumstances would not be subject to mandatory registration. (*Hofsheier,* at p. 1192.)

The California Supreme Court held, in accord with the decision of the court of appeal, "that to subject defendant to the mandatory registration requirement of section 290, subdivision (a)(1)(A) would deny defendant the equal protection of the laws." (*Hofsheier, supra,* 37 Cal.4th at p. 1193.) The Supreme Court directed the court of appeal to remand the case to the trial court for a determination of whether the defendant should be ordered to register as a sex offender under the discretionary registration provision of section 290. (*Hofsheier,* at pp. 1193, 1208-1209.)

The instant case is distinguishable from *Hofsheier* in that the victim in the instant case was under the age of 14 years, the defendant was over 20 years older than the victim, and the convictions were for attempting to commit a lewd act on a child under 14 years old (§ 288(a)) and for lewd exposure in a public place (§ 314, subd. (1)). These crimes are not substantially similar to a section 261.5 offense.

Defendant's section 288(a) conviction involves preying on young, vulnerable children, and therefore there is a valid reason for requiring mandatory sex offender registration as to a section 288(a) conviction. On the other hand, convictions for violating sections 261.5 and 288a, subdivision (b)(1) can include victims older than 14. As to older victims, the trial court may find that the offense is not sufficiently egregious and the offender is not dangerous to society, particularly to young children, to warrant mandatory sex offender registration for all section 261.5 and section 288a, subdivision (b)(1) convictions.

As the court notes in *Hofsheier, supra,* 37 Cal.4th 1185, sections 288, 288a, and 261.5 "follow a pattern of imposing greater punishment on offenses involving younger victims, but the sentences imposed at each age level are not identical. Depending on the age of the victim or perpetrator, persons convicted of oral copulation with a minor are sometimes subject to more severe sentences than persons convicted of unlawful intercourse with a minor, often subject to the same sentence, and occasionally subject to less severe sentences." (*Hofsheier,* at pp. 1195-1196.)

In *People v. Manchel* (2008) 163 Cal.App.4th 1108 (*Manchel*), the court held that mandatory sex offender registration for oral copulation with a child under age 16, by a

defendant more than 10 years older than the victim (§ 288a, subd. (b)(2)), did not violate the defendant's right to equal protection. (*Manchel*, at pp. 1111, 1115.) The *Manchel* court concluded that the defendant could not establish that he was similarly situated to another group of offenders, such as those in violation of section 261.5, who are not subject to mandatory sex offender registration. (*Manchel*, at p. 1114.)

Subsequent case law criticizes *Manchel*, *supra*, 163 Cal.App.4th 1108 for improperly basing its decision on the fact that the defendant could have been convicted of a section 288, subdivision (c)(1) crime (lewd acts involving a child 14 or 15 years old), when the defendant actually pled guilty to violating section 288a, subdivision (b)(2). The courts in *Luansing*, *supra*, 176 Cal.App.4th 676 and *People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1373-1374 (*Ranscht*) rejected *Manchel* because the *Manchel* court based its holding that there was no equal protection violation based on the section 288, subdivision (c)(1) offense not being similarly situated to the section 261.5 offense, whereas the defendant was not convicted of that crime. (*Luansing*, at pp. 1372-1374; *Ranscht*, at pp. 1373-1374.) But, here, defendant was actually convicted of a section 288(a) crime, which is essentially the same as a section 288, subdivision (c) offense, with the exception that a section 288, subdivision (c) conviction requires that the victim is between 14 and 15 years old and at least 10 years younger than the defendant, whereas the victim in a section 288(a) crime must be under 14 years old. The holding and underlying reasoning in *Manchel* thus is well founded as applied to defendant in the instant case.

As the court in *People v. Anderson* (2008) 168 Cal.App.4th 135 (*Anderson*), explained in rejecting the defendant's equal protection challenge to mandatory sex offender registration for committing a section 288, subdivision (c)(1) crime, "The holding in *Hofsheier* does not mandate a similar conclusion here. First, the Supreme Court's holding was limited to mandatory sex offender registration for violating section 288a, subdivision (b)(1). The high court made it clear repeatedly in its opinion that its analysis was limited to an equal protection challenge involving mandatory registration for one convicted of voluntary oral copulation with a minor 16 or 17 years old (§ 288a, subd. (b)(1)), as compared with discretionary registration for one convicted of voluntary sexual intercourse with a 16- or 17-year-old minor (§ 261.5). [Citation.]" (*Anderson,* at p. 141.) The *Hofsheier* court indicated its holding did not apply to sexual crimes committed against victims under the age of 14, such as the victim in the instant case.

The *Anderson* court further explained: "In this instance, we are dealing with mandatory registration based on a conviction under section 288(c)(1), i.e., committing a lewd act on a child who is 14 or 15 years old where the perpetrator is at least 10 years older than that child. Not only does that particular provision contain specific protection for minors of an age group younger than the victim involved in *Hofsheier,* it also (unlike § 288a) contains a specific intent requirement. And, unlike *Hofsheier,* there is no relevant similarly situated group for which mandatory registration is not required that may serve as the basis for an equal protection challenge here. An adult who is at least 10 years older than the victim who commits a sex offense of oral copulation on a 14- or 15-year-old minor victim may be charged with a violation of section 288(c)(1), just as

defendant was charged in this case. Defendant's group, contrary to his argument here, is not similarly situated with those convicted of voluntary oral copulation of a 16- or 17-year-old victim in violation of section 288a, subdivision (b)(1). Defendant's equal protection challenge thus fails because he cannot establish that he, by virtue of his section 288(c)(1) conviction and the mandatory registration resulting there from, is subjected to unequal treatment because there is a similarly situated group for which no such mandatory registration is a consequence of the sex offense conviction." (*Anderson, supra,* 168 Cal.App.4th at pp. 142-143.)

Likewise, here, there is no equal protection violation in imposing mandatory registration for defendant's attempted section 288(a) conviction. Defendant fails to establish any similar crime in which mandatory registration is not required. Defendant has not shown that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*Hofsheier, supra,* 37 Cal.4th at p. 1199.) A section 261.5 offense does not require the victim to be under the age of 14 and concerns the general intent offense of committing unlawful sexual intercourse.

We further conclude mandatory sex registration, as opposed to discretionary registration, for a section 288(a) offense is rationally related to a legitimate state purpose since, unlike a section 261.5 offense, a section 288(a) offense is limited to victims under the age of 14 years, who tend to be more vulnerable to being preyed upon by sexual predators than older children, and the offense requires a finding that, when the perpetrator committed the lewd act, he or she possessed specific intent "to arouse or gratify the sexual desires of either the perpetrator or the victim. [Citation.]" (*People v.*

Lopez (1998) 19 Cal.4th 282, 289.) The order requiring defendant to register as a sex offender thus does not violate the equal protection clauses of either the state or federal Constitutions.

3. Prospective Application of Amended Section 4019

After defendant's sentencing hearing in September 2009, the Legislature amended section 4019 (Stats. 2009, ch. 28, § 50 (Sen. Bill No. 18)), effective in January 2010. The amendment changed the calculation of presentence conduct credit.

Relying on *People v. Brown* (2010) 182 Cal.App.4th 1354, 1364 in which the Supreme Court recently granted review, defendant contends that the section 4019 amendment is retroactive and therefore he is entitled to additional conduct credits. In support of his claim, he asserts that the legislative intent of the amended statute was to reduce prison overcrowding and costs by shortening defendants' incarceration time. We recognize there is a split among the districts as to whether the section 4019 amendment has retroactive effect,[3] and hold that the amendment applies prospectively only.

---

[3] Section 4019 amendment held to apply retroactively: *People v. Brown, supra*, 182 Cal.App.4th at pp. 1364-1365 (Third Dist.); *People v. Landon* (2010) 183 Cal.App.4th 1096, 1099, 1108 (First Dist., Div. Two); *People v. House* (2010) 183 Cal.App.4th 1049, 1057 (Second Dist., Div. One); *People v. Norton* (2010) 184 Cal.App.4th 408, 417 (First Dist., Div. Three); *People v. Pelayo* (2010) 184 Cal.App.4th 481, 483-484 (First Dist., Div. Five).

Section 4019 amendment held to apply only prospectively: *People v. Rodriguez* (2010) 183 Cal.App.4th 1, 5 (Fifth Dist.); *People v. Otubuah* (2010) 184 Cal.App.4th 422, 436 (Fourth Dist., Div. Two); *People v. Hopkins* (2010) 184 Cal.App.4th 615, 626-627 (Sixth Dist.).

[footnote continued on next page]

Defendant was sentenced on September 18, 2009. Defendant received credit for two actual days in custody, with no additional credit for good conduct, for a total of two days of credit. Under section 4019, as amended, defendant claims he is entitled to an additional two days of credit for good conduct. We disagree.

Whether section 4019, as amended, applies retroactively is a question of law subject to independent review. (*In re Chavez* (2004) 114 Cal.App.4th 989, 994.)

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) In addition, section 4019 provides that a criminal defendant may earn additional presentence credit for good conduct, such as willingly performing assigned labor (§ 4019, subd. (b)) and complying with rules and regulations (§ 4019, subd. (c)).

When defendant was sentenced in September of 2009, under former section 4019, subdivision (f), defendant was entitled to accrual of conduct credit at the rate of six days for every four days of actual presentence custody. (Former § 4019.) Later, in October 2009, "'[T]he Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony . . . or a

---

[footnote continued from previous page]

The California Supreme Court recently granted petitions for review in *People v. Landon, supra,* 183 Cal.App.4th 1096; *People v. Brown, supra,* 182 Cal.App.4th 1354; *People v. Rodriguez, supra,* 183 Cal.App.4th 1; *People v. House, supra,* 183 Cal.App.4th 1049; and *People v. Pelayo, supra,* 184 Cal.App.4th 481.

violent felony . . . may accrue conduct credit at the rate of four days for every four days of presentence custody.'" (*People v. Otubuah, supra,* 184 Cal.App.4th at pp. 431-432.) The statute does not contain a saving clause, i.e., a clause stating that the amendment shall have prospective application only.

Section 3 provides that the Penal Code shall not have retroactive effect unless expressly so declared. (§ 3.) Thus, "'[a] new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise. [Citation.]'" (*People v. Alford* (2007) 42 Cal.4th 749, 753.)

The Supreme Court in *In re Estrada* (1965) 63 Cal.2d 740, 744-745, created an exception to the section 3 presumption of prospective application. In *Estrada,* the court considered whether a statute mitigating punishment for escape should be applied retroactively to a defendant who escaped before the effective date of the mitigating statute. The statute was silent as to retroactive application. (*Estrada,* at p. 744.) According to *Estrada,* a statutory amendment reducing punishment for a crime or changing procedure in favor of a defendant should be given retroactive effect as to cases that have not reached final judgment.[4] (*Id.* at pp. 744-745.)

In reaching its holding, the *Estrada* court explained: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined

---

[4] "Cases in which judgment is not yet final include those in which a conviction has been entered and sentence imposed but an appeal is pending when the amendment becomes effective. [Citations.]" (*In re N.D.* (2008) 167 Cal.App.4th 885, 891.)

that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*In re Estrada, supra,* 63 Cal.2d at p. 745.) Thus, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id.* at p. 748.)

Relying on *Estrada*, in *People v. Doganiere* (1978) 86 Cal.App.3d 237, 240 [Fourth Dist., Div. Two], we held that amendments to section 2900.5, providing credit for section 4019 conduct credits, were retroactive. (See also *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [amendment to section 2900.5 to credit probation jail time to sentence, when probation is revoked, is retroactive].) This holding was based on the premise that there is no legal distinction between decreasing the maximum sentence for a crime and increasing presentence credits because both mitigate punishment. (See *Hunter,* at p. 393.)

But despite numerous cases applying *Estrada*, the California Supreme Court has not held that increases to the custody credit scheme constitute mitigation of punishment.

Rather, our Supreme Court has consistently characterized the custody credit scheme as a means of encouraging and rewarding behavior. (*People v. Brown* (2004) 33 Cal.4th 382, 405; *People v. Sage* (1980) 26 Cal.3d 498, 510, fn. 1; *People v. Saffell* (1979) 25 Cal.3d 223, 233.)

Furthermore, because conduct credits are intended to motivate good behavior, the section 4019 amendment, which increases the credit accrual rate, does not represent a determination that a prior punishment is too severe. (*People v. Otubuah, supra,* 184 Cal.App.4th at pp. 434-435 [“‘it cannot be said that the punishment-reducing amendment at issue here “obviously” evinces a legislative determination that sentences for some felons are too severe, or that the Legislature intended a reduction in sentence for some felons should be extended to all to whom it lawfully can be extended’”].) We thus conclude the *Estrada* exception to prospective application of a new or amended statute does not apply, and there is no presumptive retroactivity. (See *In re Kapperman* (1974) 11 Cal.3d 542, 546; see also *People v. Otubuah*, *supra,* 184 Cal.App.4th at p. 436.)

We conclude, as we did in *People v. Otubuah*, *supra,* 184 Cal.App.4th at page 436, that, “[h]aving searched for a legislative intent regarding prospective or retroactive application, we agree with the Fifth District that ‘there is no ‘“clear and compelling implication’” [citation] that the Legislature intended the amendatory statute at issue [§ 4019] to apply retroactively. Accordingly, the [Penal Code] section 3 presumption is not rebutted.’ (*People v. Rodriguez* (2010) 182 Cal.App.4th 535, 544 [republished at 183 Cal.App.4th 1]; see also *In re E.J., supra,* 47 Cal.4th at p. 1272 [‘“[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very

clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application"']."

As the court in *People v. Hopkins, supra,* 184 Cal.App.4th 615, recently explained in support of its holding that the section 4019 amendment applies prospectively only: "Senate Bill No. 18, the legislation which amended [Penal Code] section 4019, was enacted in order to address the state's fiscal emergency, as proclaimed by Governor Schwarzenegger in December 2008. (Stats. 2009, 3d Ex. Sess., ch. 28, § 62.) By increasing the amount of credits available to certain inmates, qualifying inmates' terms will be shortened and prison populations reduced, resulting in reduced costs to the state. Obviously, if the amendment to section 4019 operated retroactively it would result in greater savings to the state, since more inmates would be eligible to have their prison terms reduced. It does not follow, however that applying the amendment prospectively is *inconsistent* with the Legislature's goal. Prospective application of the amendment also results in savings; it simply results in *less* savings than would retroactive application. Therefore, we do not think that the Legislature's intent to reduce prison expenditures is particularly instructive on the issue of retroactivity. It certainly cannot be conflated into a determination, as in *Estrada,* that the original punishment for a particular crime was too severe and that a lesser punishment was more appropriate. 'Rather, because the express purpose of Senate Bill [No.] 18 was to address the state's fiscal emergency, it is also plausible the Legislature determined the following: The persons whose sentences will be reduced under the [Penal Code] section 4019 amendment are just as culpable and deserving of punishment as they were before the amendment; after all, there has been no

legislative determination that the *offenses* for which those persons were sentenced should be punished less severely.' [Citation.]" (*Hopkins,* at p. 625, quoting in part *People v. Rodriguez, supra,* 183 Cal.App.4th at p. 9.)

The court in *Hopkins* thus concluded the rule laid out in *Estrada* was not applicable "because the amendment to section 4019 does not necessarily lessen a defendant's punishment. Instead, it allows only for additional *conduct* credit, which must be earned, as opposed to additional *custody* credit which is awarded to a defendant simply because he or she is in presentence custody. [Fn. omitted.] Applying the amendment to section 4019 retroactively would not advance the statute's purpose of rewarding good behavior while in presentence custody, since it is impossible to influence behavior *after* it has occurred." (*People v. Hopkins, supra,* 184 Cal.App.4th at p. 625, citing *People v. Rodriguez, supra,* 183 Cal.App.4th 1.)

We therefore conclude the amendment to section 4019 applies prospectively and defendant is not entitled to an increase in his custody credits.

4. Equal Protection Challenge to Section 4019

Defendant contends that paragraph (f) of section 4019, as amended, violates defendant's equal protection rights under the state and federal Constitutions because the amended paragraph adds the following italicized language: "It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody, *except that a term of six days will be deemed to have been served for every four days spent in actual*

custody for persons described in paragraph (2) of subdivision (b) or (c)." (§ 4019, subd. (f).)

This new language refers to defendants, such as defendant, who are required to register as a sex offender under section 290 or who have committed a serious felony. These defendants receive fewer credits than those who are not required to register as a sex offender. Defendant claims that the amendment violates his equal protection rights by treating him differently than those who are convicted of the same type of crimes he committed but are not required to register as sex offenders. Therefore, defendant argues, amended section 4019, subdivision (f) is unconstitutional and he is entitled to the increased rate of credit those receive who are not required to register as sex offenders: four days of credit for every two-day period of actual presentence confinement.

In support of his equal protection challenge, defendant argues that his conviction for violating section 288(a) is similar to a section 261.5 offense, which is not listed as a serious felony in section 1192.7 and does not mandate registration as a sex offender under section 290. (§§ 290, subd. (c), 1192.7, subd. (c).) Those convicted of a section 261.5 crime therefore receive four days of credit for every two-day period of actual presentence confinement (two days good conduct credit for every two days of actual presentence confinement), whereas defendant, who is similarly situated, is not entitled to the same amount of credit under amended section 4019. Defendant asserts that section 4019, as applied to defendant, therefore violates his equal protection rights because defendants convicted of a section 261.5 crime are treated more favorably than those, such

as defendant, who are convicted of a section 288(a) or section 314 offense, and thus required to register as sex offenders.

But as we explained above, defendant's equal protection challenge to amended section 4019 lacks merit because the amended version does not apply to defendant since the amended version applies prospectively only. Furthermore, we reject defendant's equal protection challenge to amended section 4019 for the same reasons we rejected defendant's equal protection challenge to imposing mandatory sex offender registration for his section 288(a) conviction. Defendant is not similarly situated to those who commit section 261.5 offenses.

In addition, subdivision (e) of the former and amended versions of section 4019 provides that defendant is not entitled to any conduct credits because he had only two days of actual custody. Former paragraph (e) of section 4019 states: "No deduction may be made under this section unless the person is committed for a period of *six* days or longer." (Italics added.) Subdivision (e) of amended section 4019 provides that "No deduction may be made under this section unless the person is committed for a period of four days or longer, or six days or longer for persons described in paragraph (2) of subdivision (b) or (c)." (§ 4019, subd. (e).)

Not only does defendant's equal protection challenge to amended section 4019, subdivision (f) lack merit but, in addition, even if it does have merit, defendant would not be entitled to any conduct credits under amended or former section 4019.

5. Order Requiring Payment of Fees as a Condition of Probation

Defendant contends that the trial court erred in ordering him to pay various

unauthorized fees as conditions of probation. The trial court ordered defendant to pay the following fees: (1) a court security fee (§ 1465.8); (2) the cost of a presentence report (§ 1203.1b); a probation supervision fee (§ 1210)[5]; and (4) a booking fee (Gov. Code, § 29550). Defendant argues that these fees are improper probation conditions because they are collateral to defendant's crimes and punishment. Such fees must therefore be contained in a separate order rather than as conditions of probation.

Citing *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072, the People argue defendant forfeited his challenge to the fee order. Defendant responds that under *People v. Scott* (1994) 9 Cal.4th 331, 354, the order is reviewable, even though he did not object to it in the trial court, because imposition of the fees as probation conditions was unauthorized. We agree.

The People's reliance on *People v. Valtakis, supra,* 105 Cal.App.4th 1066, is misplaced since *Valtakis* involved the defendant's failure to raise a procedural defect rather than a challenge to an unauthorized sentence or probation condition, as in the instant case. (*Id.* at pp. 1071-1072.)

The fees imposed in the instant case as conditions of probation were unauthorized because they were collateral to defendant's crimes and punishment. "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott, supra,* 9 Cal.4th at p. 354.) A defendant who is

---

[5] The trial court minute order cites section 1210 but it appears to be inapplicable. Section 1203.1b more likely was the intended provision authorizing imposition of the probation supervision fee.

granted probation may be ordered to pay the reasonable costs of probation, but the payment of such collateral costs cannot be made a condition of probation. (§ 1203.1; *People v. Hall* (2002) 103 Cal.App.4th 889, 892; *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321; *People v. Hart* (1998) 65 Cal.App.4th 902, 907.) A sentence requiring payment of collateral costs as a condition of probation is thus unauthorized. An order that a probationer pay the collateral costs of probation is enforceable only as a separate money judgment in a civil action. (*Brown*, at p. 322; *Hart*, at p. 907.) Any order for payment of probation costs or other collateral fees or costs should be imposed as a separate order. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1068.) Accordingly, the orders here were in error because probation fees and costs cannot be imposed as probation conditions. (*Hart*, at pp. 906-907.)

The appropriate remedy, as the People note, is not to strike the order to pay these fees and costs, but to simply "'modify the order granting probation to clarify that payment of those costs and fees is not a condition of probation but rather an order of the court entered at judgment.'" (*People v. Flores* (2008) 169 Cal.App.4th 568, 578, quoting *People v. Hart, supra*, 65 Cal.App.4th at p. 907 ["the order granting probation must be modified to delete the order to pay costs of probation from the conditions of probation, making it simply an order entered at judgment. As such, the order may be enforced as permitted in the relevant statutes"]; see also *People v. Hall, supra*, 103 Cal.App.4th at p. 892 ["We simply deem the requirement [to pay probation costs] an order, not a condition [of probation], and proceed to consider other aspects of the court's order"].)

The order granting probation in the instant case thus must be modified to delete the order to pay costs of probation from the conditions of probation, with the order to pay the collateral fees and costs imposed as a separate order entered at judgment.

6. Disposition

Probation condition Nos. 20 and 21 are modified to delete the requirement that defendant pay, as conditions of probation, the following fees and costs: (1) a court security fee (§ 1465.8); (2) the cost of a presentence report (§ 1203.1b); a probation supervision fee; and (4) a booking fee (Gov. Code, § 29550). However, the order that defendant pay such fees and costs is affirmed as an order entered as a part of the judgment, separate and apart from the conditions of probation. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

s/Hollenhorst
Acting P.J.

We concur:

s/Richli
J.

s/Miller
J.